No. 77-510

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New Mexico in this case.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court (App. A, *infra*, pp. 1a-11a) is reported at 564 P. 2d 615. The order entered on June 4, 1976, in the District Court of the Sixth Judicial District in and for Luna County, New Mexico (App. C, *infra*, pp. 14a-21a), and the findings of fact and conclusions of law of its special master filed May 5, 1975 (App. D, *infra*, pp. 22a-34a), are not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on May 23, 1977 (App. B, *infra*, pp. 12a-13a). By order of August 11, 1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the United States is entitled under its reserved water rights to the use of water in a national forest for the purpose of minimum instream flows, recreation, and stockwatering, on the ground that these are valid purposes of a national forest under the Organic Administration Act of 1897.

STATUTES INVOLVED

Section 24 (since repealed) of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471; the relevant provisions of the Organic Administration Act of June 4, 1897, 30 Stat. 11, 34-36, 16 U.S.C. 475, 481, 551; and the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531, are set forth in Appendix E, *infra*, pp. 35a-39a.

STATEMENT

This state court litigation began in 1966 as a suit among private landowners over allegedly unlawful diversions of water from the Rio Mimbres in south-

western New Mexico. In 1970 the State of New Mexico intervened, seeking a general adjudication of all water rights to the entire stream system of the Rio Mimbres. Because the Rio Mimbres flows through Gila National Forest, the United States was joined as a state court defendant pursuant to the McCarran Amendment, 43 U.S.C. 666.[1] In its answer the United States, invoking the federal law of reserved water rights, claimed entitlement to as much water as was or might become necessary to fulfill the purposes of the Gila National Forest within the watershed of the Rio Mimbres (App. A, *infra*, pp. 1a-2a).[2]

The state court appointed a special master to determine the parties' water-rights claims. In the proceedings before the special master, the United States specified three purposes of the Gila National Forest for which water was necessary: (a) maintenance of an assured flow of 2 cubic feet per second at three separate points on the stream within the national for-

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[1] Originally enacted as Section 208 of the Department of Justice Appropriation Act of 1953, 66 Stat. 560, this statute gives consent to state court suits against the United States for the adjudictaion of water rights to a river system. See *Colorado River Conservation District* v. *United States*, 424 U.S. 800, 802-803, 807-809.

[2] The United States sought reserved water rights as of five possible priority dates, corresponding to the dates of successive presidential proclamations that set apart and reserved from entry five tracts of federal public land within the Rio Mimbres watershed for inclusion in Gila National Forest. The dates are March 2, 1899; July 21, 1905; February 6, 1907; June 18, 1908; and May 9, 1910. See 34 Stat. 3123, 3126, 3274; 35 Stat. 2190; 36 Stat. 2694.

est to protect the forest from fire and erosion and to keep an endangered species of trout from depletion; (b) recreational uses incidental to hiking, fishing, camping, and hunting by visitors to the national forest; and (c) consumption by stock that graze on rangeland areas within the national forest under permits granted by the Forest Service, United States Department of Agriculture.[3] The master allowed the United States' claims to reserved water in use as of December 27, 1972, for these purposes, all of which he recognized as valid purposes of the Gila National Forest (Findings 2, 5; Conclusions 4, 9, 10, 11; App. D, *infra*, pp. 25a-27a, 31a, 33a).[4] At the same time, he ordered the United States to specify within a given time all of its future requirements for reserved water in terms of "priority, amount, purpose and periods and place of use" (App. D, *infra*, p. 34a).

Respondent then submitted to the state district court its objections to the master's report. In these objections, as supplemented by briefs and a proposed

[3] Before the special master the paramount issue between the parties was not whether the United States was entitled to water for these specified purposes, but whether the United States was required to quantify its reserved water rights. Respondent conceded in its prehearing brief that recreation was a valid purpose of national forests (Transcript of Record 467). This concession was repudiated by respondent in later proceedings in the state district court (Transcript of Record 378-379; Supplemental Transcript of Record 37).

[4] The United States was allowed water for instream flow maintenance in the amount of 2 cubic feet per second at each of the three designated points on the river. The master found that there were no private appropriators upstream from these points (Finding 3; App. D, *infra*, p. 27a).

order, respondent argued that the United States had no reserved rights to water for instream flow maintenance, for recreational activity, or for stockwatering, because they were not valid purposes of a national forest. On June 4, 1976, the state district court entered an order upholding respondent's objections and modifying the master's report accordingly (App. C, *infra*, pp. 14a-21a).

The Supreme Court of New Mexico affirmed (App. A, *infra*, pp. 1a-11a). It held that the United States possesses reserved water rights in waters appurtenant to a national forest only when the original purposes for which the forest was established "necessarily require" such a reservation, and that the original purposes of national forests are limited to those explicitly set forth in the Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. 475 (App. A, *infra*, p. 6a). Although the court stated that the Act "limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber" (*ibid.*), it then discarded the first purpose and concluded "that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber" (*id.* at 10a). The court stated that "[r]ecreational purposes and minimum instream flows were not contemplated" (*ibid*).[5]

[5] With respect to the use of water for stockwatering by holders of federal grazing permits, the court held that those water rights must be established by the individual permittees

REASONS FOR GRANTING THE PETITION

"It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 804. Against this background, the New Mexico Supreme Court has denied the United States essential reserved water rights within the Gila National Forest for maintenance of minimum instream flows, recr ation, and stockwatering. The decision derogates from the original purposes and uses of the national forests and conflicts with the decision of this Court in *Arizona* v. *California*, 373 U.S. 546; it also contradicts nearly eight decades of legislative and administrative understanding. If permitted to stand, it will threaten the ecology and restrict the use of more than 7 million acres of national forest land in New Mexico, and will jeopardize the reserved water rights of the United States in national forests throughout the West.

1. The court's decision, unless reversed, will impede the husbandry and inhibit the use of our national forests.[6] Full care and use of the forests is not pos-

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under the state law of prior appropriation, and could not be claimed by the United States under the federal law of reserved water rights, since "the United States does not have reserved water rights in the forests for these permitted uses" (*id.* at 10a-11a).

[6] Under Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792, the President is now forbidden from withdrawing any part of the public domain to enlarge the inventory of the National Forest System. The President is also forbidden by Section 11

sible without adequate water. Yet the New Mexico Supreme Court has cut off water to 7,793,195 acres of national forest land within that state for any purpose other than "to insure favorable conditions of water flow and to furnish a continuous supply of timber" (App. A, *infra*, p. 10a). Its decision may also affect state and federal cases involving water rights appurtenant to at least 17 other national forests in other states.[7]

(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974, 88 Stat. 476, 480, 16 U.S.C. (Supp. V) 1609(a), as amended by Section 9 of the National Forest Management Act of 1976, Pub. L 94-588, 90 Stat. 2949, 2957, from returning National Forest System lands to the public domain. In consequence, the enlargement or reduction of public-domain acreage in the National Forest System can now be accomplished only by an act of Congress. The National Forest System presently comprises 153,909,368 acres previously withdrawn from the public domain.

[7] *Avondale Irrigation District* v. *North Idaho Properties, Inc.*; *United States* v. *Higginson* (No. 12174), and *Soderman* v. *Kackley* (No. 12482), argued and submitted on September 7, 1977, to the Supreme Court of Idaho, involve reserved water rights in Coeur d'Alene and Caribou National Forests. Applications of the United States pending in the District Courts of the State of Colorado in and for Water Division 1 (No. W8439), Water Division 4 (Nos. W425-W438), Water Division 5 (Nos. W467-W469), Water Division 6 (Nos. W85-W86), and Water Division 7 (No. W4667) involve waters appurtenant to Arapaho, Grand Mesa, Gunnison, Manti La Sal, Pike, Roosevelt, Routt, San Juan, Uncompahgre, and White River National Forests. A general adjudication of all water rights in the Bighorn River system in Wyoming was instituted January 25, 1977, in the District Court of the Fifth Judicial District of the State of Wyoming in and for Washakie County (No. 4993) and involves waters appurtenant to Bridger and Teton National Forests. Claims in *United States*

The mischief, once done, cannot easily be undone. Under the reserved-water-rights doctrine, "the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert* v. *United States*, 426 U.S. 128, 138. If the United States has not already acquired property rights in waters for the national forests, prior appropriators may have claims superior to any future federal claim to those waters. Congress thus may be unable to overrule the New Mexico court's decision or to reaffirm prior federal rights in other national forest areas where water rights are now placed at issue, at least without needless resort to its power of eminent domain.[7a] In these circumstances, we submit, prompt review by this Court is appropriate.

2. "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, *supra*, 426 U.S. at 138. "[T]he

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v. *Benadair* (D. Ore., Civil No. 75-914) involve waters appurtenant to Winema National Forest. Claims in *United States* v. *Truckee-Carson Irrigation District* (D. Nev., Civil No. R-2987 JBA) involve waters appurtenant to Toiyabe National Forest. Claims in *United States* v. *Tongue River Water Users Association* (D. Mont., Civil No. CV-75-20-Blg) involve waters appurtenant to Custer National Forest.

[7a] Although decrees in general adjudications of water rights frequently remain open in the event of changing uses or conditions, no allowance of water for the specified uses at issue here is considered likely to occur.

issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* at 139. But the withdrawal of land from the public domain "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141.

In this case, the New Mexico Supreme Court found that the purposes of the Gila National Forest were only "to insure favorable conditions of water flow and to furnish a continuous supply of timber," and that "[r]ecreational purposes and minimum instream flows were not contemplated." App. A, *infra*, p. 10a. This narrow view misconceives the congressional intent in establishing the national forests and disregards other important purposes for which they were created.

a. The New Mexico Supreme Court purported to base its decision on the text of the Organic Administration Act of 1897 ("Organic Act"), 30 Stat. 11, 34-35, 16 U.S.C. 475.[8] The specific language relied on by the court (App. A, *infra*, p. 6a) reads:

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[8] Subsequent citations to the Organic Act will be to the appropriate section of Title 16, United States Code. The Organic Act was engrafted as a rider (30 Cong. Rec. 899 (1897)) to the Sundry Civil Expense Appropriations Act of June 4, 1897, 30 Stat. 11, and comprised the sixth (30 Stat. 34) through twentieth (30 Stat. 36) unnumbered paragraphs after the heading "SURVEYING THE PUBLIC LANDS" (30 Stat. 32). Substantially all such paragraphs, except paragraph 12 (16 U.S.C. (1970 ed.) 476), remain the law today. Paragraph 12 formerly governed sales of national-forest timber and was repealed by Section 13 of the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949, 2958.

> Purposes For Which National Forests May Be Established And Administered.
>
> * * * No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

On its face, this language identifies three purposes that justify establishment of a national forest, purposes stated by the court itself as follows (App. A, *infra*, p. 6a): "1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." The court, however, discarded without explanation the first purpose and concluded "that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber" (*id.* at 10a). The court then declared, again without explanation, that neither purpose encompassed use or water for recreation or for maintenance of minimum instream flows (*ibid.*).

In fact, the government's claim of reserved water rights for maintenance of minimum instream flows falls squarely within the purpose of "securing favorable conditions of water flows." Moreover, minimum streamflows are essential to the objective of "improving and protecting the forest." Although the special master in this case indicated that instream flow maintenance was for "fish" purposes (App. D, *infra*, p. 26a)—perhaps in deference to the endangered Gila trout—minimum streamflows also provide erosion control, fire protection, and protection for the watershed and the wildlife habitat. All of these are necessary for the Secretary of Agriculture to fulfill the duty imposed on him by the Organic Act "to preserve the forests * * * from destruction." 16 U.S.C. 551.

The New Mexico Supreme Court by its grudging interpretation of the Organic Act has failed to recognize that a national forest consists of more than trees to be harvested and a watershed to be tapped. The forest is, among other things, the wildlife living within it. By denying minimum instream flows for wildlife protection and for the fish that require those amounts of water, the court ignored the relationships among the living things in the forest that preserve the ecological balance and keep the forest healthy. Assurance of sufficient stream flows to nourish and preserve the entire forest—not simply the timber in the trees—is within the Organic Act's purpose "to improve and protect the forest."

In addition to the language, the legislative history of the Organic Act demonstrates that erosion control and general ecosystem and watershed management were important parts of the statutory purposes. Representative McRae, a sponsor of the Act, emphasized

that a crucial forest purpose was "to conserve the water flows" (30 Cong. Rec. 967 (1897)). He asserted the need to regulate timber-cutting and preserve the ground cover for retention of water and prevention of destructive floods (30 Cong. Rec. 966 (1897), to furnish a stable, steady flow for "navigation" or for "irrigation of the deserts" (*ibid.*), and to preserve "forest conditions upon which water conditions and water flow are dependent" (*ibid.*).[9] The Organic Act, of course, requires that timber-cutting and the maintenance of "favorable conditions of water flows" be reconciled with the purpose of "improv[ing] and protect[ing] the forest." The right to minimum stream flows asserted here operates to satisfy all these statutory dictates through judicious watershed management.

Moreover, the duty of fish and wildlife protection in the national forests was incorporated into early

[9] This view was shared by the Act's opponents. Representative Ellis criticized the bill and the recent establishment of forest reserves by President Cleveland, claiming that both were intended for the purpose of "the preservation of the water supply" (30 Cong. Rec. 1007 (1897)). Senator Stewart, another critic, asserted that private settlers rather than federal agencies enforcing the Organic Act would be the "best guardians" for "protecting the streams for irrigating purposes" (30 Cong. Rec. 1280 (1897)). Representative Loud objected to two of the Act's purposes, timber-cutting and "keeping the snows upon the mountains" (30 Cong. Rec. 1399 (1897)). He claimed that these purposes were incompatible, and observed that existing forest reserves in California had as their "only object" the retention of mountain snows so as not to "bring down all at once the full flood upon our valleys" (*ibid.*).

congressional appropriations. In 1899, "forest agents" were required to "aid in the enforcement of the laws of the State or Territory * * * in relation to the protection of fish and game."[10] In the Department of Agriculture Appropriations Act of March 4, 1907, 34 Stat. 1256, 1270, Congress included among the functions of the new Forest Service the responsibility to "care for fish and game supplied to stock the national forests or the waters therein." Such enactments demonstrate a congressional intention to protect fish and wildlife resources in national forests. *Brooks* v. *Dewar*, 313 U.S. 354, 361.

b. The legislative and administrative record both before and since the Organic Act demonstrates consistently that the purposes for which Congress established the national forests also include recreation. The "Creative Act" of March 3, 1891, 26 Stat. 1095, 1103 (former Section 24), the first legislative act providing for the establishment of national forests,[11] authorized the President to reserve from the public domain, as "forest reserves," public lands "wholly or in part covered with timber or undergrowth, whether of commercial value or not." Although the Act said

[10] Sundry Civil Expense Appropriations Act of March 3, 1899, 30 Stat. 1074, 1095; repeated in Department of Agriculture Appropriations Acts of March 3, 1905, 33 Stat. 861, 872-873, June 30, 1906, 34 Stat. 669, 683, and March 4, 1907, 34 Stat. 1256, 1269.

[11] The Creative Act was repealed on October 21, 1976, by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792. See note 6, *supra*.

nothing about the purposes of such reservations, the Chief of the Forestry Division of the Department of Agriculture (B. E. Fernow) promptly construed it to include recreational use. *Report of the Chief of the Division of Forestry*, p. 224 (1891):

> * * * There can hardly be any doubt, however, as to what objects and considerations should be kept in view in reserving such lands and withdrawing them from private occupancy. These are first and foremost of economic importance, not only for the present but more specially for the future prosperity of the people residing near such reservations, namely, first, to assure a continuous forest cover of the soil on mountain slopes and crests for the purpose of preserving or equalizing waterflow in the streams which are to serve for purpose of irrigation, and to prevent formation of torrents and soil washing; second, to assure a continuous supply of wood material from a timbered area by cutting judiciously and with a view to reproduction. *Secondary objects, such as can and will be subserved at the same time with those first cited, are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. Both objects are legitimate*, but the first class is infinitely more important, and the second is easily provided for in securing the first. [Emphasis supplied.]

The responsible administrative official thus recognized that aesthetic and recreational purposes, while "[s]econdary objects" of the national forests, were equally

"legitimate" ones which could be promoted consistently and simultaneously with the more important economic objectives. All the purposes of the Creative Act, he noted, could be achieved by proper forest management through "regulation of the occupancy and use of the reservation" (*id.* at 226).

This administrative policy was part of the background for passage of the Organic Act six years later. See page 9, *supra*. This Act did not narrow the purposes for which national forests could be established, except by disqualifying those public lands that were worth more for minerals or agriculture "than for forest purposes." The Act's first stated purpose, "to improve and protect the forest," was consistent with those "[s]econdary objects" noted in the Fernow Report: "to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure." Moreover, the Act authorized the Secretary of Agriculture (16 U.S.C. 551) to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." "[O]ccupancy and use" plainly contemplate purposes additional to water flow and timber supply, the only two recognized by the New Mexico Supreme Court. In fact, the statutory command "to regulate their occupancy and use" is virtually a verbatim repetition of the method proposed by Chief Forester Fernow in 1891 to accomplish all the forest purposes he identified (pp. 14-15,

supra).[12] Fernow's view of the national forests as "places of retreat for those in quest of health, recreation, and pleasure"—which was very early true of the Gila National Forest [13]—was also echoed and approved by a provision of the Organic Act (16 U.S.C. 478) authorizing entry by "any person" on the national forests "for all proper and lawful purposes," provided the visitor complied with the "rules and regulations covering such national forests."

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[12] The New Mexico Supreme Court sought to draw a distinction between "uses" and "purposes" of the national forests, arguing that a decision by Congress to open the national forests "for the many diversified uses which are now allowed does not expand the purposes for which they were originally created." App. A, *infra*, pp. 7a-8a. This position obscures the fact that the "uses" here in question, such as recreation, were known to and contemplated by Congress from the very beginning. There is no reason to suppose that this Court in *Cappaert* v. *United States, supra,* intended to limit the federal government's reserved water rights to the *primary* purposes of a reservation of public lands, thereby foreclosing for lack of water all secondary purposes that were within the original contemplation of Congress. Applying the "intent" test of *Cappaert,* see pp. 8-9, *supra,* it is unlikely that Congress, while recognizing that national forests would serve various useful purposes, intended to reserve only enough water to achieve a fraction of them.

[13] Visits to the Gila Cliff Dwellings (made a national monument in 1907, 35 Stat. 2162) and Gila Hot Springs, both located in the Gila National Forest, predated establishment of the forest and continue to this day. In 1906, the Gila National Forest was visited by 108,700 persons. See Gila National Forest Recreation Management Plan, 1964, p. 3.

Roughly contemporaneous materials evinced a continuing concern for the recreational value of the national forests. By the Act of February 28, 1899, 30 Stat. 908, 16 U.S.C. 495, Congress authorized the leasing of national-forest land near springs for resort hotels. *The 1902 Forest Reserve Manual* (p. 8) stated:

> All law abiding people are permitted to travel in forest reserves for the purpose of prospecting, surveying, to go to and from their own lands or claims, and for pleasure and recreation.

Regulation 42 in the Forest Service's 1905 publication, *Use of the National Forest Reserves,* provided:

> Hotels, stores, mills, summer residences, and similar establishments will be allowed upon reserve lands wherever the demand is legitimate and consistent with the best interests of the reserve.

Similarly, the *Forest Service Atlas* for 1907 (p. 20) indicates that permits for boating, fish hatcheries, hotels, hunting, charcoal pits, cabins, camping, resorts, and trout ponds were routinely issued.[14]

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[14] The Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, provides in part:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation

c. So far as stockwatering is concerned, this Court has recognized that reasonable stockwatering may be a legitimate use of a national forest under the Organic Act. In *United States* v. *Grimaud*, 220 U.S. 506, 516, the Court stated:

> To pasture sheep and cattle on the [national-forest] reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail.

See also *Light* v. *United States*, 220 U.S. 523. In recognition of this principle, the Forest Service has established a system of special-use permits to control access to grazing areas and waters.

The decision of the New Mexico Supreme Court would require each stockowner holding a federal grazing permit to obtain an individual adjudication of his or her water rights under state law. The Gila National Forest has been part of ranching country for 100 years, and at present 160 permit holders run more than 29,000 cattle in the forest.[15] To require these permit holders to adjudicate their water rights individually would place an unreasonable burden on federal range management and impair federal control of federal lands. Cf. *Kleppe* v. *New Mexico*, 426 U.S. 529, 542-543.

3. In contrast to the New Mexico Supreme Court's narrow view of the purposes of the national forests and the scope of the federal government's reserved rights in waters appurtenant to them, this Court has recognized that the government has reserved water in national forests—and in Gila National Forest in particular—for a variety of purposes, including all those at issue here. In *Arizona* v. *California*, 373 U.S. 546, decree entered, 376 U.S. 340, the special master con-

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of, the purposes for which the national forests were established as set forth in section 475 of this title.

Construing that language, the New Mexico Supreme Court said: "The fact that Congress declared [the additional purposes] to be 'supplemental to' the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act." App. A, *infra*, p. 10a. We disagree. In our view, that language merely makes explicit a policy that has been recognized since passage of the Organic Act in 1897. As the House and Senate Reports accompanying the 1960 Act stated:

> [I]n any establishment of a national forest a purpose set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.

H.R. Rep. No. 1551, 86th Cong., 2d Sess., p. 4 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess., p. 4 (1960).

[15] U.S. Forest Service, *Men Who Matched the Mountains: The Forest Service in the Southwest*, p. 204 (GPO, 1972).

cluded that eleven national forests, including part of the Gila National Forest, were entitled to reserved water for the folowing purposes:

> (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Water is used for recreation, domestic purposes, irrigation and stock watering.

Special Master's Report, December 5, 1960, p. 96. Pursuant to that report, this Court determined that the reserved water claims of the United States for national forest and other uses should be allowed. 373 U.S. at 595, 601. Although the Court's decision involved waters of the Gila River, not the Rio Mimbres, the purposes for which the United States could reserve water in the Gila National Forest were established by the decision and should be controlling here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1977.

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 11,094

MIMBRES VALLEY IRRIGATION CO.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,

STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Norman Hodges, District Judge

OPINION

PAYNE, Justice

This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres

which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953 (Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 66 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ. P. 53(e)(2) [1], objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for

[1] Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in United States v. Winters, 207 U.S. 564 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the Winters case has been subject to inconclusive debate through the years. It was further clarified, however, in Arizona v. California, 373 U.S. 546 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the Winters doctrine, and for the first time extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National

> Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601.

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In Cappeart v. United States, 426 U.S. 128 (1976), the Court stated:

> [W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created . . . . (Citations omitted.)

426 U.S. at 139.

> The implied - reservation - of - water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . . (Citation omitted.)

Id. at 141.

The Cappeart decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in Arizona v. California[2] concludes that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the Cappeart Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamation dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

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[2] 376 U.S. 340, 350 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 Nat.Res.Law. 503 (1974). The pertinent provision of that Act reads as follows:

> § 475. Purposes For Which National Forests May Be Established And Administered.
>
> . . . No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, rec-

reational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . ." 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed protection or timber preservation, those secondary uses would not be permitted to continue. United States v. Grimaud, 220 U.S. 506 (1911); Light v. United States, 220 U.S. 523 (1911); United States v. Hunt, 19 F.2d 634 (N.D. Ariz. 1927); Honchok v. Hardin, 326 Fed. Supp. 988 (D. Md. 1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not ex-

pand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

> It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

> In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and,

as recently stated by the Court in Morton v. Mancari, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

> "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

> "The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

. . . .

> [F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service

. . .

522 F.2d at 953-54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior

discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

/s/ H. Vern Payne
H. VERN PAYNE
Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Justice

/s/ Mack Easley
MACK EASLEY
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
LUNA COUNTY

Monday, May 23, 1977

No. 11,094

MIMBRES VALLEY IRRIGATION CO.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES,

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,
STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE.

This cause having heretofore been argued, submitted and taken under advisement, and the Court now being sufficiently advised in the premises announces its decision by Mr. Justice Payne, Mr. Justice Sosa and Mr. Justice Easley concurring, affirming the judgment of the trial court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Luna, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is hereby remanded to the said District Court of Luna County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

APPENDIX C

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed June 4, 1976]

ORDER SUSTAINING OBJECTIONS AND MODIFYING FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on to be heard upon the Findings of Fact and Conclusions of Law of the Special Master, filed herein on May 2, 1975, and the State of New Mexico, plaintiff-in-intervention, having filed its Objections thereto on May 15, 1975, the parties having been heard on said Objections, and upon due deliberation and being fully advised,

IT IS ORDERED that the Objections are hereby sustained and that the Special Master's Findings of Fact and Conclusions are modified in accordance herewith, as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:

a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres Watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.

d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13, and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W., Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

Cor. No. 8 on the South line of the NE ¼, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No.

9, a point of curve; thence Northwesterly on a 7°50′ curve to the left (chord bearing and distance N.45°54′W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE ¼, said Section 35; thence N.1°43′W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE ¼, said Section 26, bears N.75°30′W., 949.62 ft. dist.; thence S.80°00′E., 669.00 ft. to the Northeast Cor., thence S.9°55′W., 960 ft. to the Southeast Cor., thence N. 81°00′W., 669.00 ft. to the Southwest Cor.; thence N.9°57′E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding No. 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.

6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Find-

ing 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.

7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.

8. That in addition to the above-listed present uses made by the United States, or its permittees, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States.

10. That recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

11. That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

12. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A. 1953.

DONE this 26th day of March, 1976.

/s/ Norman Hodges
HON. NORMAN HODGES
District Judge

APPENDIX D

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed May 5, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the require-

ments and purposes of the reservations included in the following withdrawal orders:

a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 14S., R. 10W., N.M. P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21,

28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.

d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permitees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3- 2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	535		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

3. That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
4. That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.
5. That said instream uses numbered 024, 511, and 786 can be made without interferring with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
6. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to

a point thirteen chains south of the north line of the southwest ¼ of Section 10; thence east to the west line of northeast ¼ of southwest corner of same; thence east along the south line of same and along south line of northwest ¼ of southeast ¼ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast ¼ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

7. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U. S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35,

and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

> All that part of the SW ¼, Section 25; SE ¼, Section 26; NE ¼, Section 35; and NW ¼, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE ¼, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29° 43′E., 37.30 ft. to Cor. No. 1-B; thence N. 60°17′E., 21.25 ft. to Cor. No. 1-C; thence N.29°43W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW ¼, said Section 25; thence S.18°30′E., 2380.00 ft. to Cor. No. 3; thence S.47°59′W., 1573.40 ft. to Cor. No. 4; thence S.23°00′W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW ¼, said Section 36; thence S.89° 03′W., 2504.57 ft. to Cor. No. 8 on the South line of the NE ¼, said Section 35 and in the

center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13′W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50′ curve to the left (chord bearing and distance N.45°54′W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE ¼, said Section 35; thence N.1°43′W., 3493-.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

10. That of that portion of the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

    Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE ¼, said Section 26, bears N.75°30′W., 949.62 ft. dist.; thence S.80°00′E., 669.00 ft. to the Northeast Cor., thence S.9°55′W., 960 ft. to the Southeast Cor.; thence N.81°00′W., 669.00 ft. to the Southwest Cor.; thence N.9°57′E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.

12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of §§ 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the degree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S. C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such

additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permitee and not to the United States.
10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interferring with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress

authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.

13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

IRWIN S. MOISE
Special Master

May 2, 1975.

APPENDIX E

STATUTES INVOLVED

Creative Act

Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471, was repealed on October 21, 1976, by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792. Prior to repeal, it read as follows:

> SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Organic Administration Act of 1897

Extracts from the Sundry Civil Expense Appropriations Act (or Organic Administration Act) of June 4, 1897, 30 Stat. 11, 34-36, 16 U.S.C. 475, 481, 551, reads as follows:

> [30 Stat. 34-35; 16 U.S.C. 475.] All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, un-

suspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act shall be as far as practicable controlled and administered with the following provisions:

[30 Stat. 35; 16 U.S.C. 475.] No public forest reservation [1] shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

[30 Stat. 35; 16 U.S.C. 551.] The Secretary of the Interior [2] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy

[1] On March 4, 1907, Congress redesignated the "forest reservations" or "forest reserves" as "national forests". 34 Stat. 1269.

[2] On February 1, 1905, Congress transferred control of the "forest reserves" from the Secretary of the Interior to the Secretary of Agriculture: 33 Stat. 628, 16 U.S.C. 472.

and use and to preserve the forests thereon from destruction; * * *

[30 Stat. 36; 16 U.S.C. 481.] All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Multiple-Use Sustained-Yield Act of 1960

This Act, 74 Stat. 215, 16 U.S.C. 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962, reads in its entirety as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

SEC. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

SEC. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

SEC. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the

combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

SEC. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."

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